

DISSENTING OPINION OF PROFESSOR RAÚL EMILIO VINUESA

Preliminary Issues

1. On 2 August 2012, the President of the Tribunal circulated a draft Decision on Jurisdiction, which was upheld by the majority of the Tribunal that very day, absent any prior deliberation. By means of the Registrar of the Tribunal, I informed the Parties that not only did I dissent from such a decision and the reasoning in support thereof, but I also reserved the right to agree to or dissent from any other argument that may not have been included in the adopted Decision. After the Decision had been adopted, the President of the Tribunal circulated a new draft with reasoning that differs significantly from the former draft Decision. In view of this situation, this Dissenting Opinion presents my position in regard to the main arguments put forward by both Parties in the course of the proceedings in order to express my disagreement with the arguments of the majority which were eventually included in this Award.

I. Introduction

2. On 28 June 2011, the Republic of Ecuador (hereinafter, “**Ecuador**” or the “**Claimant**”) filed a Request for Arbitration against the United States of America (hereinafter, the “**United States**” or the “**Respondent**”) on the interpretation of Article II(7) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment of 1993 (hereinafter, the “**Treaty**” or the “**BIT**”).
3. Article II(7) of the Treaty provides that:

Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.
4. The Request for Arbitration filed by Ecuador was based on Article VII of the Treaty.¹
5. Article VII(1) of the Treaty provides that:

Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.
6. According to Ecuador, the dispute arises from the erroneous interpretation and application of Article II(7) of the Treaty in the Partial Award issued in the *Chevron*² case.³
7. Ecuador maintained that the dispute arose from the United States’ refusal to engage in discussions on the timely requests made by Ecuador, which called for an answer. Ecuador claimed that its

¹ Claimant’s Request, pp. 2-3.

² *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2007-2, Partial Award of 30 March 2010.

³ Claimant’s Request, pp. 4 *et seq.*

efforts to reach a solution through consultations or other diplomatic channels proved to be unsuccessful and, therefore, the issue remains unresolved: “This Request for Arbitration seeks resolution of the dispute, in the interest of both Parties, by means of an authoritative determination on the proper interpretation and application of paragraph 7 of Article 11 of the Treaty that accords with what the Republic of Ecuador considers to have been the intentions of the Parties at the time when the Treaty was concluded.”⁴

8. On 29 March 2012, the United States submitted its Statement of Defence pursuant to Article 19 of the UNCITRAL Rules and Procedural Order No. 1.
9. The Respondent asserted that there was no dispute whatsoever but rather a unilateral attempt by Ecuador to secure a new interpretation of Article II(7) of the Treaty, alleging that no provision of either the BIT nor international law supported Ecuador’s request to obligate a Contracting State to interpret the Treaty.⁵
10. On 25 April 2012, the United States submitted its Memorial on Objections to Jurisdiction of the Tribunal.
11. On 23 May 2012, Ecuador submitted its Counter-Memorial on Jurisdiction.
12. The objections to the jurisdiction of the Tribunal as raised by the Respondent may be summarised as follows: Article VII of the BIT does not authorise State Parties to resort to arbitration in order to secure an abstract interpretation of a treaty clause, which means that, in the absence of a concrete case, there is no jurisdiction. Nor is there jurisdiction in the absence of a dispute or in the event of failure to infer positive opposition giving rise to such dispute from the United States’ silence. There follows below a separate analysis of these objections.

II. The Compromissory Clause: Article VII of the BIT

13. Ecuador based its Request for Arbitration on Article VII of the BIT. The United States objected to the jurisdiction of the Tribunal by alleging that the Parties had failed to consent under Article VII to arbitrate issues removed from actual disputes in relation to the performance of their obligations pursuant to the Treaty. The Respondent maintained that, even if the facts show that a dispute does exist, Ecuador failed to resort to the suitable mechanism in order to engage in consultations before commencing the arbitration.⁶
14. The Respondent stated that, were a dispute to exist, such a dispute was between Ecuador and Chevron, not the United States. Rather than a request, the demand made by Ecuador to the United States by means of its Diplomatic Note was an ultimatum whereby Ecuador threatened to submit the United States to arbitration if it refused to accept the interpretation it proposed.⁷
15. According to the Respondent, since there was no violation of the Treaty, there was no concrete dispute on the interpretation of the Treaty which may be submitted to the jurisdiction of this Tribunal pursuant to Article VII.

⁴ *Ibid.*, p. 7.

⁵ Respondent’s Statement of Defense, pp. 1-2.

⁶ Respondent’s Memorial on Jurisdiction, p. 3; Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 110:9-111:17; Transcript (Hearing on Jurisdiction) Day 2, 26 June 2012, p. 311:7-16.

⁷ *Ibid.*, p. 3, Transcript (Hearing on Jurisdiction), Day 1, p. 14:11-20.

16. The Respondent maintained that the points at issue in the Request for Arbitration posed merely abstract questions and demonstrated the lack of a concrete dispute between the Parties. The United States found Ecuador's demand to be political in nature, and thus, it could not be settled through arbitration.
17. According to the United States, the requirement of allegation of a breach is firmly enshrined in Article VII. I cite Judge Fitzmaurice in his separate opinion in the ICJ case *Northern Cameroons*, where he stated that: "This minimum, is that one party should be making or should have made a complaint, claim or protest about an act, omission, or course of conduct, present or past, of the other party".⁸
18. In my opinion, it is clear that Judge Fitzmaurice was making reference to a dispute on the application of a treaty which was claimed to have been breached, not only its interpretation. It is worth recalling that this separate opinion penned by Judge Fitzmaurice was not followed by the majority, who, on the contrary, acknowledged the Court's power to issue a declaratory judgment.⁹
19. For its part, Ecuador argued that Article VII empowers the Tribunal to issue a binding decision on a dispute between the parties concerning the interpretation and application of a Treaty and in particular on the meaning or application of a specific provision.¹⁰
20. Ecuador maintained that Article VII confers jurisdiction over "*any dispute*" concerning the interpretation or application of the Treaty. The Claimant based its position on the ordinary meaning of the terms of Article VII and the precedents of international jurisprudence that confirm that an Article VII tribunal can exercise jurisdiction over abstract disputes, insofar as such disputes concern the interpretation and application of the Treaty.¹¹
21. Ecuador alleged that, in principle, international law does not demand as a prerequisite to the finding of a dispute that it involve a breach of the Treaty or that it be a concrete dispute, more than what is provided by Article VII.¹²
22. As to the terms of Article VII, Ecuador maintained that its ordinary meaning confers jurisdiction upon this Tribunal regarding any dispute concerning the interpretation or application of Article II(7). In support of its position, the Claimant cited the Permanent Court of International Justice (the "**PCIJ**") which, in interpreting a similar compromissory clause, asserted that a tribunal may exercise jurisdiction over any dispute, because the clause's jurisdictional reach was as comprehensive as possible.¹³
23. I agree with Ecuador that the fact that the phrase "interpretation or application" of Article VII of the BIT was stated in a disjunctive manner evidences the Parties' agreement that a dispute concerning the interpretation of the Treaty may be submitted to arbitration without also requiring that a dispute regarding the application of the Treaty be submitted at the same time, and *vice versa*.¹⁴

⁸ *Case Concerning the Northern Cameroons* (Cameroon v. United Kingdom) (hereinafter "*Northern Cameroons*"), Separate Opinion of Judge Fitzmaurice, ICJ Reports 1963, p. 109.

⁹ *Ibid.*, Judgment of 2 December 1963, ICJ Reports 1963, p. 37.

¹⁰ Claimant's Counter-Memorial on Jurisdiction, p. 9.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, p. 10, citing *Mavrommatis Palestine Concessions* (Greece v. U.K.), Judgment of 30 August 1924, 1924 P.C.I.J., Series A, No. 2, p. 11.

¹⁴ Claimant's Counter-Memorial on Jurisdiction, p. 11.

24. Under international law, there is no doubt that the terms “interpretation” and “application” are distinct concepts. From the viewpoint of legal doctrine, a convincing clarification was offered by the *Harvard Law School’s Draft Convention on the Law of Treaties*, which defined the term “interpretation” as “the process of determining the meaning of a text”, as opposed to “application”, which is defined as “the process of determining the consequences which, according to the text, should follow in a given situation”.¹⁵
25. By citing the position adopted by the United States in the case *United States Diplomatic and Consular Staff in Tehran*,¹⁶ Ecuador argued that a dispute on the interpretation of a treaty may arise irrespective of whether there is a dispute regarding the treaty’s application, provided that the parties have different viewpoints as to the meaning and scope of a treaty clause.

A. Disputes between an Investor and a State Party (Article VI) and Disputes between States (Article VII)

26. The United States alleged that Article VII of the Treaty should be construed within the framework of Article VI whereby the investors of a Party may commence an arbitration proceeding against the other Party with respect to investment disputes and secure a final and binding award.¹⁷ The Respondent maintains that this provision is vital for the operation of the BIT and constitutes a separate and essential mechanism whereby the Parties have authorised arbitral tribunals to settle actual disputes that investors may submit to arbitration directly against the host State.¹⁸ Due to Article VI, the United States concludes that a State-to-State tribunal constituted under Article VII lacks appellate jurisdiction over such awards. As Professor M. Reisman notes, the United States alleges that Articles VI and VII create two distinct tracks of arbitration that “assign[] a different range of disputes exclusively to each of the tracks”.¹⁹
27. According to the United States, the limited scope of Article VII is confirmed by the basic object and purpose of the Treaty, i.e., the promotion and reciprocal protection of investment. Article VI provides the main mechanism for the settlement of disputes concerning breach by either Party of the obligations undertaken under the Treaty. On the other hand, Article VII creates a residual mechanism intended to ensure that the Parties abide by the treaty in certain circumstances.
28. According to Ecuador, the dispute resolution systems provided for Article VI and Article VII of the Treaty are distinct and independent from one another. Article VI refers to disputes between investors and a State Party regarding alleged breaches of the Treaty. Article VI does not concern all disputes, but rather only certain concrete disputes submitted by an investor against the host State. Article VI does not authorise the abstract interpretation of the Treaty in the absence of a claim for breach of the Treaty. By contrast, the mechanism of Article VII, being independent from the mechanism of Article VI, makes reference to any dispute between States concerning the

¹⁵ *Ibid.*, citing *Harvard Law School’s Draft Convention on the Law Treaties*. In addition, there is ample precedent to support the meaning of these concepts, see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, *ICJ Reports 1950*; *Case concerning a boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, Decision of 21 October 1994, *RIAA*, Vol. XXII. In the same vein, the opinion of Judge Higgins in the case *Oil Platforms* regarding the distinctive elements of “interpretation” and “application” cited by Ecuador is also relevant (Claimant’s Counter-Memorial on Jurisdiction, pp. 11-12 citing *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 12 December 1996, *ICJ Reports 1996*).

¹⁶ Claimant’s Counter-Memorial on Jurisdiction, p. 13, note 18.

¹⁷ Respondent’s Memorial on Objections to Jurisdiction, p. 19.

¹⁸ *Ibid.*, pp. 19-20.

¹⁹ *Ibid.*, p. 20.

interpretation or application of the Treaty. The parties to the disputes under Article VI and Article VII differ as do the scope and content of the disputes submitted under one mechanism or the other.

29. Ecuador argued that the Article VII system is not an appellate mechanism for awards issued under the dispute settlement provision of Article VI. The Claimant also submitted that Article VII did not entail a referral system or a mechanism aimed at issuing advisory opinions.
30. The United States relied on no precedent whatsoever in support of the residual nature of the dispute settlement mechanism set forth in Article VII or the limited scope thereof, arguing that Article VII of the Treaty is there “[...]for example, to resolve a dispute over a Party’s non-payment of an investor-State arbitration award in violation of Article VI(6) of the Treaty”.²⁰
31. In my view, neither the text nor the context of the Treaty allow a restrictive and partial interpretation of Article VII, let alone the dependence or subordination thereof to the mechanism provided for by Article VI of the Treaty. The mechanisms set forth in Article VI and Article VII are independent from one another. Thus, the awards issued within the framework of each system are fully independent. Consequently, the awards issued in accordance with Article VI are binding upon the Parties to the dispute only, i.e., the investor of one Party and the other State Party, whereas the awards issued under Article VII are binding upon State Parties only.

B. Consultations (Article V) and Recourse to Inter-State Arbitration (Article VII)

32. According to the United States, the context of the Treaty confirms the absence of a dispute, since, for a dispute to exist, there must be a claim for breach of a treaty provision. In the Respondent’s opinion, Article VII should be interpreted within the framework of the text of Article V of the Treaty.²¹
33. Article V provides that:

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.
34. The United States considered that Ecuador’s request concerned a “matter” or issue, i.e., a situation covered by Article V, not a dispute involving the existence of a claim for breach of a Treaty provision, as enshrined in Article VII. Hence, the Respondent argued that, as long as Ecuador claimed that the United States refused to engage in consultations in order to agree upon the meaning of Article II(7), the mechanism applicable to refer such claims for resolution is set forth in Article V, not Article VII. However, Ecuador has never relied upon Article V.²²
35. From my point of view, having read the relevant Articles of the Treaty, it cannot be concluded that Article V is a prerequisite or a condition precedent for recourse to Article VII. Therefore, Ecuador was not obligated to follow such a course of action.

²⁰ *Ibid.*, p. 20.

²¹ *Ibid.*, p. 18.

²² *Ibid.*, p. 19.

36. The United States argued that if the Parties wish to clarify the meaning of the Treaty, they must reach agreement, for instance, through the consultation procedure set forth in Article V.²³ In this regard, I believe that a problem arises where either party deliberately does not wish to clarify the meaning of a treaty. This situation allows the other State to resort to the mechanism agreed upon in Article VII of the Treaty, i.e., arbitration.
37. Even though Article V is not a prerequisite or condition precedent to trigger recourse to Article VII, in the event of frustrated consultations and negotiations, the only alternative in order to settle a dispute is the possibility of resorting to arbitration as a method to ensure a neutral and suitable solution.
38. The myth of judicializing diplomacy in resorting to arbitration in order to settle a dispute underestimates the dispute settlement system which, in this case, is activated by the reluctance of one of the Parties to acknowledge a dispute and the frustration of prospective negotiations as the primary method to reach an agreement acceptable to both Parties. Therefore, the interpretation made by an arbitral tribunal constituted under Article VII will neither jeopardise nor undermine the arbitration mechanism between investors and States set forth in Article VI. On the other hand, it is difficult to understand how recourse to arbitration will politicise investment disputes between investors and States, where the purpose of arbitration is to interpret a treaty rule according to what the parties regarded is its content and scope, thus ensuring the necessary credibility of the system by clarifying the law in force, as the Parties stated at the time of expressing their consent to be bound.
39. According to the United States, the purpose of Article V is to foster talks, not arbitration, on a wide variety of issues concerning the interpretation or application of the Treaty, including abstract matters in relation to the meaning of Article II(7).²⁴ In this regard, it strikes me that recourse to arbitration may not be seriously considered a threat to the continuity of diplomatic talks, especially in the face of the specific situation where a State refuses to adopt a position, so that its unilateral attitude be understood as constituting the absence of a dispute. The position of remaining silent and not responding adopted by the United States, coupled with its expectation that its attitude should not be deemed to create a dispute by inference, will be analysed *infra*, taking into consideration such facts as may be relevant and the arguments of both Parties.

C. The Obligation to Respond and the Obligation to Agree on an Interpretation

40. The Respondent asserted that the content of neither Article VII of the BIT nor general international law support the Claimant's position of resorting to an arbitral tribunal so that it can interpret a clause of the Treaty. Ecuador's argument is opposed by the very meaning of Article VII, read in context and in light of the object and purpose of the Treaty, as well as by a century of unbroken international jurisprudence.²⁵
41. According to the United States, it has no obligation to respond to Ecuador, let alone confirm its unilateral interpretation of the Treaty, i.e., under both the Treaty and international law, Ecuador is not entitled to demand that the United States confirm its own interpretation of Article II(7) or submit to arbitration.

²³ *Ibid.*, p. 38.

²⁴ *Ibid.*, pp. 64-65.

²⁵ *Ibid.*, pp. 15-16.

42. The United States argued that it exercised its own discretion in failing to respond to Ecuador's demand. The Respondent alleged that it retains the discretion to mutually agree on a joint interpretation or "subsequent agreement", only if it so desires in order to clarify the Parties' understanding of a particular provision. Likewise, it retains the discretion not to go into detail as to the meaning of a specific treaty provision.²⁶ According to the United States, no provision of the Treaty compels the Respondent to respond to Ecuador's demand to confirm its interpretation.²⁷
43. The United States stated that the only provision of the Treaty where it has undertaken to engage in consultations as to the meaning of its provisions was Article V. As Professor Tomuschat has opined, this would have been the proper avenue to see if the Parties could agree to a mutually acceptable interpretive statement.²⁸
44. The United States argued that general international law does not require a State to respond to an interpretive statement.²⁹ Accordingly, I believe that Ecuador did not object to this argument by Respondent. Undoubtedly, under general international law, there is no generic obligation whereby a State is compelled to negotiate or agree upon a new interpretation of a treaty. Nevertheless, Ecuador's demand focuses on a claim for interpretation of a treaty clause as agreed upon by the parties at the time of expressing their consent to be bound. It is evident that Ecuador may not "impose" its unilateral interpretation on either the United States or the Tribunal, but it simply submitted the dispute on interpretation to the decision of this *ad hoc* Tribunal pursuant to Article VII of the Treaty. Ecuador requests that the Tribunal acknowledge its interpretation, although it is for the Tribunal, not the Parties, to make such a determination.
45. In this context, it is relevant to highlight the United States' citation in its Memorial on Objections to Jurisdiction, of the statement made by the President of this Tribunal, whereby "[t]he role of the treaty interpreter is not to look for the will of one of the parties or the intended will of one of the parties, but the consensual will of all of the parties, which stems from the text they agreed to and upon which the agreement was built".³⁰ The United States reiterated its view that there is no dispute because there is no concrete case, since Ecuador made no allegation of a breach of the Treaty. In addition, the Respondent noted that Ecuador confirmed that it accused the United States of no misbehaviour, of no breach of its international obligations, it has required no compensation from the United States, and it has requested no order against it.³¹ Ecuador has not denied this allegation made by Respondent. Thus, it may be asserted that there was no dispute whatsoever between the Parties on the existence of an obligation to agree on the interpretation of a clause of the Treaty.
46. In my opinion, Ecuador's demand contains no requirement to "agree upon" or "impose" a given course of action, but requires that Article II(7) be interpreted in accordance with the common intention of the Parties at the time of the Treaty's negotiation and later in their expressed consent to be bound by the Treaty. Ecuador's demand is based on the compromissory clause agreed upon by the Parties in Article VII of the BIT. It makes reference to a dispute concerning the interpretation of the Treaty, not a dispute on the obligation of the United States to respond to Ecuador's demand that it confirm its own interpretation.

D. The Interpreting Function and the Lawmaking Function

²⁶ *Ibid.*, pp. 36-37.

²⁷ *Ibid.*, p. 38.

²⁸ *Ibid.*, p. 39.

²⁹ *Ibid.*, p. 41.

³⁰ *Ibid.*, pp. 48-49.

³¹ Transcript (Preliminary Hearing), 21 March 2012, p. 18:17-25 (Statement by Ecuador's counsel).

47. According to the United States, were the Tribunal to issue an interpretation of Article II(7) as required by Ecuador, it would be exceeding its judicial powers and creating international law, to the detriment of the right of both Parties to interpret the Treaty.³²
48. The Respondent maintained that Ecuador's position entailed judicializing the relationships of State Parties under the Treaty³³ by purporting to extend the scope of Article VII to situations not arising from the breach of a Treaty provision.
49. According to the United States, in view of the complete lack of any alleged breach or other wrongdoing by the United States, this Tribunal should decline Ecuador's invitation to engage in judicial lawmaking, and dismiss Ecuador's request.³⁴
50. The United States alleges that the Tribunal's assertion of jurisdiction to interpret Article II(7) of the BIT would entail assuming a legislative power that the Tribunal does not have.³⁵ The Respondent maintained that an abstract interpretation of Article II(7) exceeds the judicial functions granted by Article VII.
51. According to the United States, Ecuador requests that this Tribunal be "*the author of new rules*" in order to find jurisdiction under Article VII and ultimately to issue "*interpretations*" of Article II(7) that go beyond the text of the Treaty.³⁶
52. On the basis of the foregoing assertion, I believe, firstly, that the Respondent clearly stated that it resists, and thus, opposes, the interpretation of Article II(7) proposed by Ecuador. Secondly, it shows an incomprehensible confusion between the interpreting function and the lawmaking function under international law, especially where, in its Memorial on Objections to Jurisdiction, the Respondent cited *verbatim* the statement made by the President of this Tribunal: "*An interpreter of law is someone who tries to explain what other people have drafted. He does not and should not create new rules. The interpreter does not have the right to say more or less than what is said in the text he is interpreting, and which is not his will but that of the author of the rules*".³⁷
53. It is evident that if the interpretation alleged by Ecuador exceeds what the Parties agreed on in the Treaty, it is the Tribunal who shall determine that in addressing the merits of the case concerning the interpretation of Article II(7). The content and scope of Ecuador's interpretation does not concern the jurisdiction of the Tribunal, but rather go to the merits of the issue.
54. According to the United States, Ecuador's demand concerning the general and abstract interpretation of a Treaty clause deprives the Parties from the right to interpret the Treaty.³⁸ However, in this regard, I believe that it is the Treaty in particular that, by means of the compromissory clause of Article VII, gives States the possibility of resorting to arbitration in order to settle a dispute concerning the interpretation of one of its provisions.

E. Abstract Interpretation and the Existence of a Concrete Case

³² Transcript (Hearing on Jurisdiction), 25 June 2012, p. 130:3-6.

³³ *Ibid.*, p. 133:4-10.

³⁴ Respondent's Memorial on Objections to Jurisdiction, p. 29.

³⁵ *Ibid.*, p. 55.

³⁶ *Ibid.*

³⁷ *Ibid.*, see note 189.

³⁸ *Ibid.*, p. 59.

55. The United States claimed that Article VII of the BIT does not authorise State Parties to resort to arbitration in order to settle disputes concerning the interpretation of the Treaty in the absence of a concrete case. According to the Respondent, the concrete case requirement entails one party alleging the breach by the other party of a treaty clause.
56. The position of the United States is based on the ICJ precedent in *Northern Cameroons*.³⁹
57. In turn, Ecuador stated that the ICJ's reference in *Northern Cameroons* to the notion of a concrete case is restricted to the practical consequences that a judgment might have on the parties to the dispute, not to the existence of an allegation of breach of a rule of international law. As a result, the Claimant argued that Article VII of the BIT allows State Parties to resort to arbitration in order to settle a dispute on the abstract interpretation of a treaty in force and effect.
58. In the *Northern Cameroons* case, the ICJ held:
- The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases **where there exists at the time of the adjudication an actual controversy** involving a conflict of legal interests between the parties. The Court's judgment must have practical consequences in the sense that **it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.**⁴⁰
59. In my understanding, one cannot but read that paragraph in its own context: for the first time the Court referred to a “concrete case” with regard to the impossibility of delivering a judgment without legal effect due to the fact that there was no actual case. The inexistence of a case was a direct consequence of the Trusteeship Agreement's termination and the recognition of Nigeria as a new independent State. For the Court, these situations made the case moot.
60. As mentioned, the Court found that the object of the dispute disappeared due to the fact that the Trusteeship Agreement was terminated a few days after the Claimant's application was filed. The Court further stated,
- [W]ithin two days after the filing of the Application the substantive interest which the procedural right would have protected, disappeared with the termination of the Trusteeship Agreement with respect to the Northern Cameroons. After 1 June 1961 there was no “trust territory” and no inhabitants for whose protection the trust functions could be exercised. [...] ⁴¹
61. It follows that the “practical consequences” requirement mentioned by the ICJ in the *Northern Cameroons* case was related to the actual existence of a dispute in the sense that it must affect “existing” legal rights and obligations of the parties.
62. In the present case, Ecuador's claimed purpose is to obtain an authentic interpretation of a treaty clause through the application of international law by an impartial tribunal constituted under article VII of the BIT. The natural effect of the decision of an arbitral award concerning the interpretation of a treaty clause will be binding on both parties in relation to the proper meaning and scope of that

³⁹ *Northern Cameroons* (Cameroon v. United Kingdom), Judgment of 2 December 1963, *ICJ Reports* 1963.

⁴⁰ *Ibid.*, pp. 33-34 (emphasis added).

⁴¹ *Ibid.*, p. 36.

particular clause. All other effects that a binding award may have in relation to the parties to the dispute should not be dealt with during the jurisdictional phase. It should be sufficient for the Tribunal to understand that, whatever the final outcome of its decision, it surely will bring a measure of juridical certainty on the applicable law between the parties.

F. Declaratory judgments and practical consequences in international law

63. It is illustrative to refer to certain passages in the *Northern Cameroons* case that clarifies the Court's position regarding what it meant when referring to "practical consequences" precisely in relation to its power to produce a declaratory judgment and its practical effects.
64. In that context, the *Northern Cameroons* case is also a relevant precedent concerning treaty interpretation. In reference to the declaratory effect pursued by Cameroon in its Application, the Court stated that:

Throughout these proceedings the contention of the Republic of Cameroon has been that all it seeks is a declaratory judgment of the Court that prior to the termination of the Trusteeship Agreement with respect to the Northern Cameroons, the United Kingdom has breached the provisions of the Agreement, and that, if its application were admissible and the Court has jurisdiction to proceed to the merits, **such a declaratory judgment is not only one the Court could make but one that it should make [...]**.⁴²

65. The Court added,

That the Court may, in an appropriate case, make a declaratory judgment is indisputable... If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so. **Moreover the Court observes that if in a declaratory judgment it expounds a rule of customary law or interprets a treaty, which remains in force, its judgment has a continuing applicability.** But in this case there is a dispute about the interpretation and application of a treaty—the Trusteeship Agreement—which has now been terminated, is no longer in force, and there can be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the Court might render.⁴³

66. The Court then cited the PCIJ on the *Interpretation of Judgment No. 7 and 8*,⁴⁴ where it stated that

The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation of law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.⁴⁵

67. The Court also observed that,

⁴² *Ibid.* (emphasis added).

⁴³ *Ibid.*, p. 37 (emphasis added).

⁴⁴ *Case Concerning the Factory at Chorzów*, 1927, *PCIJ Series A*, No. 13, p. 20.

⁴⁵ *Northern Cameroons*, *ICJ Reports 1963*, p. 37.

It may also be agreed, as Counsel for the Applicant has suggested, **that after a judgment is rendered, the use which the successful party makes of the judgment is a matter which lies on the political and not in the judicial plane.** But it is not the function of a Court merely to provide a basis for political action if no question of actual legal rights is involved. Whatever the Court adjudicates on the merits of a dispute, one or the other party, or both parties, as a factual matter, are in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court's judgment or defiance thereof. That is not the situation here.⁴⁶

68. The Court finally concluded that

Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties.⁴⁷

69. Under those circumstances, the Court stressed that, “[a]ny judgment which the Court might pronounce would be without object”.⁴⁸

70. In conclusion, the existence of a “concrete case” depends upon the existence of a dispute of legal interests with respect to a rule of law, which is, at the time of adjudication, in force between the parties. If not, “[...] the Court is relegated to an issue remote from reality”.⁴⁹

71. Thus, the practical consequences of an award under article VII of the BIT should be understood in the sense that “*it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations*”.⁵⁰

72. Our present case concerns a treaty that is in force and binding upon Ecuador and United States. It is not for this Tribunal to decide at the jurisdictional phase on the legal consequences of its award without going into the merits. In deciding on its jurisdiction, it suffices for the Tribunal to confirm that the Treaty is in force and that the settlement of the dispute concerning interpretation is intended to provoke juridical certainty on the proper meaning and scope of a treaty clause, thus removing uncertainty from their legal obligations, with binding effects for both Parties.

73. In my understanding, the Respondent's arguments based on the *Northern Cameroons* case concerning the requirement of a concrete case and the requirement of practical consequences are misleading.

⁴⁶ *Ibid.*, pp. 37-38 (emphasis added).

⁴⁷ *Ibid.*, p. 38.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, p. 33.

⁵⁰ *Ibid.*, p. 34 (emphasis added).

G. Precedents Concerning the Abstract Interpretation of Treaties and their Interpretation in the Face of Concrete Cases (Allegation of Breach)

74. International courts and tribunals have repeatedly applied compromissory clauses similar to that of Article VII in order to determine whether to exercise jurisdiction over disputes concerning the interpretation of treaties in which there is no allegation of a breach of the treaty.
75. During the jurisdictional phase, both the United States and Ecuador engaged in broad arguments and discussions on the precedents relied upon by one or both Parties.

Precedents Relied Upon by the United States

76. The only case that the United States invoked in its Memorial on Objections to Jurisdiction to support its position on the inability of an international tribunal to exercise jurisdiction over a demand for interpretation of a treaty clause without allegation of breach is *Cases of Dual Nationality* settled by the Anglo-Italian Conciliation Commission, created by the compromissory clause of Article 83 of the Peace Treaty entered into with Italy in 1947.⁵¹ The Conciliation Commission found that an authoritative abstract interpretation may create rules of law, which is not a jurisdictional function, but rather, a legislative function.⁵²
77. The Commission made a distinction between the power of interpretation and the lawmaking power, based on the fact that the United Kingdom's request sought more than just the interpretation of the text, which might lead the tribunal to exceed its jurisdiction, thus performing a lawmaking function. Nonetheless, in the case at hand, Ecuador demands that Article II(7) be interpreted within the meaning and scope assigned to the clause in the course of negotiations and at the time where both Parties expressed their consent to be bound by the Treaty.
78. Ecuador did not request that a new rule be created, but that a treaty clause be construed within the meaning assigned by the Parties at the time of expressing their consent to be bound. For this reason, whether the proposed interpretation exceeds what the Parties expressly agreed upon at the time of drafting the text of the relevant clause shall be determined by the Tribunal when analysing the merits.
79. The Conciliation Commission declined jurisdiction as it was to act under a compromissory clause which expressly required a breach of treaty. The Commission asserted that it had to limit its activities to determining the disputes arising from claims presented according to the terms of Article 78 of the Peace Treaty.⁵³ However, the compromissory clauses of Article 83 of the Peace Treaty differs fundamentally from Article VII of the BIT relied upon in this case.
80. According to Ecuador, in the *Cases of Dual Nationality*, Italy first was required to fail to satisfy a claim in the face of the alleged breach as enshrined in the Peace Treaty. A bi-national Commission would then intervene, whereupon, in the event that the dispute was not settled, the arbitration mechanism was set in motion. Furthermore, Ecuador alleged that the Commission was especially mindful not to exceed the limits of its jurisdiction and make an abstract interpretation of future application that would be binding on all parties without their express consent.⁵⁴

⁵¹ Respondent's Memorial on Jurisdiction, pp. 57-58; Claimant's Counter-Memorial on Jurisdiction, pp. 21-22.

⁵² Transcript (Hearing on Jurisdiction), 25 June 2012, p. 130:7-25.

⁵³ Transcript (Hearing on Jurisdiction), 26 June 2012, p. 240:4-10.

⁵⁴ Claimant's Counter-Memorial on Jurisdiction, pp. 24-25.

81. On my reading, the text of the Award makes clear that the Commission expressed that, in the exercise of its jurisdictional functions, it “[...] can only conclude that the Commission must limit its activities to determining the disputes arising from claims presented according to the terms of Article 78 of the Peace Treaty”. Consequently, it understood that it had not been granted the power “to exceed the limits which the Peace Treaty assigns formally to its jurisdiction [...] One cannot exceed the limits which the principles, the text and the spirit assign to the competence of the Commission [...]”.⁵⁵
82. In this regard, we may conclude that it is clear that the Anglo-Italian Commission had no jurisdiction as its jurisdiction was conditional upon the text and spirit of the compromissory clause of the treaty which limited it to the existence of a dispute concerning breach of the relief scheme. Within such a framework, the compromissory clause differs fundamentally from that agreed upon by the Parties in the instant case through Article VII of the BIT. Therefore, in my opinion, the only precedent relied upon by the United States is irrelevant.
83. What is highly revealing about the *Cases of Double Nationality* is that the Anglo-Italian Commission assumed that it had features inherent in any conciliation commission, and thus, such functions as were not inherent therein had to be expressly acknowledged in the treaty that created them.⁵⁶
84. Moreover, the United States alleged that the existence of a concrete case concerning the breach of a rule of international law is evidenced by precedents from tribunals settling disputes between investors and States, such as ICSID tribunals. Regarding this argument, it should be borne in mind that for an ICSID tribunal to have jurisdiction, there must be an alleged breach of an investment protection treaty. ICSID arbitration tribunals only have jurisdiction over disputes between investors and States in which the breach of a treaty clause relied upon as a basis for the jurisdiction of the tribunal must be alleged.

Precedents Relied Upon by Ecuador

85. In turn, Ecuador made reference to a series of international precedents in which it found consistent and repeated application of compromissory clauses, similar to that of Article VII of the BIT, admitting the exercise of the judicial function for the purpose of interpreting clauses, without a specific allegation of a breach of treaty.
86. A brief reference to such precedents sets in context the importance of the scope that international tribunals attach to clauses similar to that of Article VII of the BIT so as to determine their own jurisdiction.
87. In the case *Certain German Interests in Polish Upper Silesia*,⁵⁷ the PCIJ dismissed a jurisdictional objection based on the allegedly abstract character of the question at issue because a State is not precluded from seizing a tribunal’s jurisdiction in relation to an abstract issue of treaty interpretation.⁵⁸
88. The Court held:

⁵⁵ *Cases of Dual Nationality*, Anglo-Italian Conciliation Commission, Decision No. 22 of 8 May 1954, *RIAA*, Vol. XIV, p. 34.

⁵⁶ *Ibid.*, p. 35.

⁵⁷ *Certain German Interests in Polish Upper Silesia (Merits)*, (1926), *PCJI Series A*, No. 7.

⁵⁸ Claimant’s Counter-Memorial on Jurisdiction, p. 14.

There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this is one of the most important functions which it can fulfil. It has, in fact, already had occasion to do so in the Judgment No. [Treaty of Neuilly].⁵⁹

89. In this case, the United States alleged⁶⁰ that the compromissory clause at issue in *Certain German Interests* covered “differences of opinion” and not a “dispute”. Therefore, the United States argued that a lower standard was established in order to secure jurisdiction. However, the text of the compromissory clause that gave rise to the precedent mentioned *supra* clearly evidenced that the parties understood that they were referring to “international disputes”. The simple reading of the relevant portions of the ruling indicates that the Court made no distinction whatsoever between a “difference of opinion” and a “dispute” concerning interpretation.
90. The United States maintained that in *Judgment No. 3* of the PCIJ, Bulgaria and Greece had expressly consented to the Court’s interpretation of the Treaty of Neuilly. By applying such reasoning to the case at hand, I understand that Article VII of the BIT also evidences an agreement, although in this general case it is an agreement to arbitrate “any dispute”, including those on abstract interpretations of the Treaty.
91. The case concerning the *Rights of Nationals of the United States of America in Morocco* is another example of acknowledgement by the ICJ of its ability to interpret a treaty for the purpose of clarifying the parties’ rights and obligations, thus removing the absence of certainty as to the law in force.⁶¹ According to the United States, even though it was the accused party France brought the case to the ICJ. Thus, not surprisingly, France did not frame the issues in terms of alleged treaty breaches, but rather sought a declaration of its rights and obligations under the treaty.⁶² Nevertheless, the simple reading of the case demonstrates that the Court eventually issued a decision regardless of the breach of any obligation under the agreements invoked.
92. In the case concerning the *Interpretation of the Statute of the Memel Territory*, the PCIJ claimed to have jurisdiction over the interpretation of Article 17 of the Statute irrespective of the existence of a breach. The Permanent Court asserted:

The actual text of Article 17 shows that the two procedures relate to different objects. The object of *the* procedure before the Council is the examination of an ‘infraction of the provisions of the Convention’, which presupposes an act already committed, whereas the procedure before the Court is concerned with ‘any difference of opinion in regards to questions of law or fact.’ Such difference of opinion may arise without any infraction having been noted”.⁶³

93. Article 17 of the Statute stated that “*any difference of opinion*” constituted “*a dispute of an international character*” pursuant to Article 14 of the Covenant of the League of Nations.⁶⁴

⁵⁹ *Certain German Interests in Polish Upper Silesia (Merits)*, (1926), *PCJ Series A*, No. 7, pp. 18-19.

⁶⁰ Transcript (Hearing on Jurisdiction), 25 June 2012, p. 147:14-24.

⁶¹ *Rights of Nationals of the United States of America in Morocco* (France v. United States of America), Judgment of 27 August 1952, *ICJ Reports 1952*.

⁶² Transcript (Hearing on Jurisdiction), 25 June 2012, pp. 145:18-146:1.

⁶³ *Interpretation of the Statute of the Memel Territory*, Judgment (Preliminary Objections) (1932), *PCIJ Series A/B*, No. 49, p. 248.

⁶⁴ See text of Art. 17 in Claimant’s Counter-Memorial on Jurisdiction, p. 20, note 41.

94. In addition, the Court held that the purpose of proceedings before the Council involved breach of treaty clauses, which assumes an act that has already occurred, whereas proceedings before the Court concerned any difference of opinion on questions of fact or of law.
95. In the case of *Pensions of Officials of the Saar Territory*,⁶⁵ the arbitral tribunal found that it had jurisdiction over a request for the interpretation of Article 10 of the Baden-Baden Agreement even though no breach of the treaty had been alleged.
96. Such a criterion was also adopted by the Tribunal in the case of *The Re-Valuation of the German Mark*, in deciding on the interpretation of the 1953 Agreement on German External Debts, regardless of the existence of an allegation of breach of the relevant agreement. The Tribunal held:

The Applicant's right to an authoritative interpretation of the clause in dispute [...] is grounded on the bedrock of the considerations which the Applicants gave and the concessions which they made in Exchange for the disputed clause. They have the right to know what is the legal effect of the language used. The Tribunal in the exercise of its judicial functions is obliged to inform them.⁶⁶

97. Apart from such precedents, it is worth analysing conclusive precedents from the Iran-United States Claims Tribunal, whereby the Tribunal exercised jurisdiction over matters concerning abstract interpretation.
98. Within the framework of Case No. A/2, the Iran-U.S. Claims Tribunal maintained that:

According to article VI paragraph 4 of the Claims Settlement Declaration, "any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon request of either Iran or the United States", and according to paragraph 17 of the General Declaration, and Article II, paragraph 3 of the Claims Settlement Declaration, any dispute arising between the Parties as to the interpretation of any provision of the General Declaration may be submitted by either Party to binding arbitration by the Tribunal. On that dual basis, the Tribunal has not only the power but the duty to give an interpretation on the point raised by Iran.⁶⁷

99. Case No. A/17 is another example of a precedent of the Iran-U.S. Claims Tribunal in which the Tribunal acknowledged that its decision concerned solely interpretative guidance.⁶⁸ Thus, it did not involve a decision concerning the breach of an applicable rule of international law.
100. The United States tried to mitigate the weakness of its position in the face of the cases determined by the Iran-United States Claims Tribunal by claiming that in those cases, the parties had expressly consented to the extension of the tribunal's jurisdiction.⁶⁹ Contrary to the position of the United States, the simple reading of both awards indicates that none of those decisions made reference to a

⁶⁵ *Pensions of officials of the Saar Territory*, Germany – Government Commission of the Saar Territory, *RIAA*, Vol. III (1934).

⁶⁶ *The Question whether the re-valuation of the German Mark in 1961 and 1969 constitutes a case for the application of the clause in article 2(e) of the Annex I A of the 1953 Agreement on German External Debts*, *RIAA*, Vol. XIX (1980) p. 89.

⁶⁷ *Islamic Republic of Iran v. United States of America*, Iran-U.S. Claims Tribunal, Case No. A/2, Decision No. DEC 1-A2-FT, 26 January 1982, Part II.

⁶⁸ *United States of America v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, DEC. 37-A17-FT, 18 June 1985.

⁶⁹ Transcript (Hearing on Jurisdiction), 25 June 2012, p. 140:7-12.

special consent of the parties in order to empower the tribunal to hear interpretation disputes irrespective of treaty breaches.

101. The United States also argued that, in the context of cases A/2 and A/17, the parties had never objected to the jurisdiction of the Tribunal. In support of its position, the Respondent cited the concurring opinion of two of the judges who stated that it was the Parties' practice to modify the Tribunal's jurisdiction when necessary by mutual consent.⁷⁰ Ecuador considers the United States' argument regarding the fact that neither party had objected to the jurisdiction of the Tribunal in the foregoing cases irrelevant since neither of these awards was based on the absence of such objections.⁷¹
102. In sum, I believe that both those cases indicate that tribunals operating under compromissory clauses similar to that of Article VII of the Treaty are empowered to settle disputes regarding the interpretation of a treaty, even absent allegations of breach.
103. According to the United States, all cases cited by Ecuador arose initially out of claims of treaty breach, thus easily satisfying the concreteness requirement.⁷² The Respondent maintained that sometimes issues of interpretation were dominant because the dispute turned primarily on resolving opposing positions as to the meaning of treaty provisions, while sometimes issues of application were dominant.
104. During the oral hearings, the United States asserted that all cases argued by Ecuador either support its own position on the need of a concrete case in full —which means that they arose from allegations of treaty breaches—, or else they may be distinguished since the disputing parties agreed to extend the tribunal's jurisdiction.⁷³
105. In my view, that the originality of these arguments exceeds the bounds of legal imagination is evident from a simple comparison of the plain text of the decisions cited, and their reasoning and logic, with the compromissory clauses that empowered the tribunals to settle disputes concerning the interpretation of a treaty.

H. Conclusion on the Scope of the Compromissory Clause of Article VII

106. International jurisprudence is consistent regarding the exercise of jurisdiction over disputes concerning the interpretation of a treaty absent an allegation of treaty breach. Such jurisprudence applied the specific agreements which conferred jurisdiction upon every tribunal to hear interpretation disputes absent an allegation of violation of law.
107. The most conclusive acknowledgement by conventional international law distinguishing interpretative disputes from those regarding the application of a treaty is found in the wording of Article 36(2) of the Statute of the International Court of Justice, which recognises the possibility of exercising jurisdiction over treaty interpretation disputes regardless of jurisdiction over other matters.
108. Article 36(2) of the Statute of the International Court of Justice provides that:

⁷⁰ *Ibid.*, pp. 159:19-160:12.

⁷¹ Transcript (Hearing on Jurisdiction), 26 June 2012, p. 237:3-7.

⁷² Transcript (Hearing on Jurisdiction), 25 June 2012, pp. 136:22-137:1.

⁷³ *Ibid.*, p. 126:11-22.

[...] in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

109. The precedents cited *supra* simply confirm that the only possible interpretation of the text and context of Article VII of the BIT is that the Tribunal has jurisdiction to interpret Article II(7) and inform the Parties regarding its content and scope, thus creating legal certainty on the law in force between the Parties.
110. The references made by the United States to precedents on dispute resolution between investors and States⁷⁴ are inapposite to the case at hand, since the jurisdiction of such tribunals is limited to disputes concerning the breach or violation of a provision of an investment protection treaty, and not to hear interpretation disputes outside the framework of an alleged treaty breach.
111. The formula of Article VII was not invented by the parties to the BIT, but repeats a traditional compromissory clause of general international law which has been applied since the turn of the 20th century. Treaty interpretation may be neither wide nor narrow. It should abide by the terms and conditions agreed upon by the parties. The text and context of Article VII give rise to no confusion, obscurity, ambiguity or absurd or unreasonable results. The express text, as construed in good faith according to its ordinary meaning, determines without ambiguity or confusion that any dispute concerning treaty interpretation may trigger the dispute settlement mechanism which was agreed upon by the Parties. Such an interpretation confirms the need to preserve the requisite legal certainty on the content and scope of the law in force of each provision of the Treaty.
112. The compromissory clause contained in Article VII was freely agreed upon by the Parties, and, according to the United States, it is the clear expression of their will to submit to arbitration.⁷⁵ Article VII does not require or condition the parties to exhaust diplomatic channels prior to arbitration. It requires the existence of a dispute, but is not conditional upon an allegation of breach of a rule of international law.
113. In this context, a decision of this Tribunal on the content and scope of Article II(7) of the BIT would have practical consequences for both Parties through an authoritative interpretation clarifying the Parties' rights and obligations and thus removing the uncertainty derived from contrasting or opposed interpretations between them. Accordingly, the practical consequences of any judgment or award are established with regard to both Parties to the dispute insofar as the legal rule subject to interpretation or application by the Tribunal is in force and effect.
114. For the purpose of determining whether the Tribunal has jurisdiction or not, it suffices to look at Ecuador's claim for interpretation of Article II(7) of the BIT in accordance with the common will of the Parties at the time of expressing their consent to be bound by the Treaty. Ecuador's prospective claims as to the scope of the clause subject to interpretation concern the merits of the case, and therefore, a decision in favour of the jurisdiction of the Tribunal does not entail a pre-judgment on the correctness of the interpretation alleged by Claimant.

⁷⁴ Respondent's Memorial Jurisdiction, pp. 24 *et seq.*

⁷⁵ In accordance with the Memorandum of the President of the United States of America to the U.S. Congress in connection with the Ecuador-U.S. BIT.

115. Article VII constitutes the legal framework applicable in order to submit a dispute on the interpretation of a treaty clause to the jurisdiction of an arbitral tribunal. Ecuador’s demand concerns an interpretation dispute, not a dispute on the obligation of the United States to negotiate or agree upon a new interpretation of the Treaty.

III. Existence of a Dispute

116. The Respondent objects to the jurisdiction of the Tribunal on the grounds that there is not dispute on the interpretation of Article II(7) of the BIT as alleged by Ecuador. This objection focuses on the content and scope of the definition of “dispute”.
117. The United States argues once again that, for a dispute to exist, there must be a concrete case—an allegation of treaty breach—as well as express positive opposition. Ecuador maintains that the definition of “dispute” is not limited to the existence of a concrete case and that the Respondent has demonstrated its positive opposition, both expressly and in an implied manner.
118. International jurisprudence is consistent in referring to the definition of a “dispute” and the conditions for its existence under international law.
119. In this context, in the case of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (hereinafter, *Georgia v. Russia*), the ICJ held:

The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: “A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” (*Judgement No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11) Whether there is a dispute in a given case is a matter for “objective determination” by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). “It must be shown that the claim of one party is positively opposed by the other” (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328) (and most recently *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Ruanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 40, para. 90). The Court’s determination must turn on a determination of the facts. The matter is one of substance not of form. As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject matter.⁷⁶

⁷⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment of 1 April 2011, *ICJ Reports, 2011*, para. 30, p 16.

120. In the case of *Questions relating to the Obligation to Prosecute or Extradite* between Belgium and Senegal, the Court confirmed the content of the definition of a “dispute” between States.⁷⁷
121. Returning to the *Mavrommatis* case, the PCIJ found that a dispute is “a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.”⁷⁸ Accordingly, an interpretation dispute may arise from the opposing attitudes of two States as to the interpretation of a treaty clause.
122. The definition of “dispute” should not be at issue for the Parties. However, at the time of its expounding on its objection to jurisdiction, the United States invoked a requirement —the existence of a concrete case— which is not part of the traditional definition or its expression in the most recent precedents of international tribunals.
123. As demonstrated above, under international law, for a dispute to exist, it is not necessary for either party to have alleged the breach of a rule of international law attributable to the other party. Nevertheless, the Respondent summarizes the argument for the purpose of denying that the scope of Article VII of the BIT covers interpretative disputes— alleging the inexistence of a concrete case— in order to maintain that the positive opposition requirement depends inextricably on the existence of a concrete case.

Positive Opposition

124. According to the United States, the notion of a “dispute” does not encompass Ecuador’s claims. The Respondent cites its expert, Professor Tomuschat, in order to assert that the word “dispute” has “obtained a specific meaning in international practice,” requiring that the parties to a treaty have put themselves in positive opposition with one another over a concrete case involving a claim of breach under the treaty.⁷⁹
125. In short, the United States reiterated its arguments on the need for a breach allegation in order to apply Article VII of the BIT, as well as to establish the requirement that a “dispute” exists. According to Respondent, there is no “dispute” between the parties since there is no positive opposition in relation to any allegation of treaty breach.⁸⁰
126. According to Ecuador, a dispute on the interpretation of a BIT clause exists, since the United States is in positive opposition to the content of such an interpretation. This positive opposition was both expressed, by means of the positions adopted by the United States in the course of the arbitration proceeding, and implied, by inference from the attitudes assumed prior to the commencement of this proceeding.

a) Express Positive Opposition

127. Ecuador alleged that the United States has manifested its positive opposition to Ecuador’s interpretation through its express statements showing that it considers Ecuador’s position to be “unilateral”. Its express opposition is also manifest in its taking the position that the interpretation

⁷⁷ *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment of 20 July 2012, *ICJ Reports 2012*, paras. 45-46.

⁷⁸ *The Mavrommatis Palestine Concessions*, Judgment No. 2 (1924), *PCIJ Series A*, No. 2, p. 11.

⁷⁹ Respondent’s Memorial on Jurisdiction, p. 17.

⁸⁰ *Ibid.*, p. 29.

given by the *Chevron* tribunal was “*res judicata*” not only for purposes of that dispute but also for Ecuador’s relationships with other parties (including the United States).⁸¹

128. In this regard, it can also be stated that the position adopted by the United States is that Ecuador’s interpretation of Article II(7) entails the exercise of a lawmaking power that this Tribunal does not enjoy. Such a position inextricably leads to the express acknowledgement of the United States’ positive opposition to the meaning of Article II(7) purported by Ecuador.
129. Accordingly, the United States maintained that the jurisdiction of the Tribunal must be determined at the time of the filing of the Request for Arbitration: “In order for this Tribunal to have jurisdiction, therefore, it must determine that the United States had put itself in positive opposition with Ecuador over the meaning of Article II.7 as of June 28, 2011, the date of the Request for Arbitration and Statement of Claim”.⁸²
130. According to Ecuador, the position adopted by the United States in the course of this proceeding confirms the existence of a dispute arising prior to 28 June 2011, the date when Ecuador learned about the end of the diplomatic exchanges which followed the Note of 8 June 2010. In Ecuador’s opinion, the critical date of the dispute is the date on which the United States served notice of its refusal to respond to Ecuador’s claims.
131. Ecuador maintains that the documents filed during this arbitration demonstrate that the Respondent has manifested its opposition to Ecuador’s interpretation of Article II(7) on several occasions.⁸³
132. In this regard, I consider that the Respondent’s allegations during the proceeding may not give rise to a dispute over which this Tribunal may exercise jurisdiction on account of the fact that such a dispute must have arisen upon the commencement of the arbitration proceeding.⁸⁴ However, were it to be shown that such dispute arose prior to the commencement of the actual proceeding, the position adopted by the United States throughout the proceeding would be conclusive evidence that the dispute alleged by Ecuador already existed.
133. Consequently, only if the attitudes assumed by the United States prior to the commencement of this proceeding allow an inference of positive opposition to Ecuador’s interpretation of Article II(7) would it be possible to determine the existence of a dispute, which could then be confirmed by the positions adopted by the Respondent in the course of this arbitration proceeding.
134. Therefore, it is essential to analyse the basic rules of international law on the establishment of a positive opposition by inference from the attitudes of a State in order to determine whether a dispute exists in the instant case.

b) Positive opposition by inference

135. In Ecuador’s view, the positive opposition of the United States may be established by inference from its behavior and its attitude in refusing to respond to Ecuador’s request when a response was unquestionably called for and by stating that there was no dispute.⁸⁵

⁸¹ Claimant’s Counter-Memorial on Jurisdiction, para. 66.

⁸² Transcript (Hearing on Jurisdiction), 25 June 2012, p. 169:2-6.

⁸³ Claimant’s Counter-Memorial on Jurisdiction, pp. 34 *et seq.*

⁸⁴ *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment of 20 July 2012, *ICJ Reports 2012*, paras. 46, 48; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment of 1 April 2011, *ICJ Reports 2011*, para. 30.

⁸⁵ Claimant’s Counter-Memorial on Jurisdiction, para. 67.

136. Ecuador held that international jurisprudence allows inferring the existence of a dispute in the case at hand.⁸⁶ Its argument was mainly based on the precedents set by the ICJ in *Georgia v. Russia Federation* and *Cameroon v. Nigeria*.
137. According to Ecuador, due to the specific circumstances in which this case arose, the attitude and the acquiescence of the United States are inconsistent with its fundamental duty to perform the Treaty in good faith.⁸⁷ Ecuador affirmed that the *bona fide* principle within a treaty relationship serves to ensure trust and create legitimate expectations concerning the development of legal relationships between the parties.⁸⁸
138. Ecuador, acknowledging that in absence of a specific obligation of a treaty, a State may not justifiably base itself on the *bona fide* principle to ground its claim,⁸⁹ argued breach of good faith by the United States in relation to the application of the Treaty.⁹⁰ Ecuador concluded that while the United States retained the ability not to give an interpretation, it could not in good faith seek to avoid the implications of such a choice, namely, the inference that a dispute exists.⁹¹
139. On the other hand, according to the United States, silence alone cannot establish positive opposition. It is only when a party's actions make it obvious that its views are positively opposed to another party's views that silence could allow an objective determination of positive opposition.⁹²
140. The argument of the United States can be reduced to the view that absent a claim for any Treaty breach, there is no duty to respond to Ecuador's demand.⁹³
141. As regards the precedents relied on by Ecuador regarding the possibility to infer the existence of a dispute through positive opposition, the United States held that in each of those cases and even in the absence an explicit statement by the parties denying the claim, the actions of the parties constituted clear evidence that they opposed the allegation of breach, thus creating a dispute.⁹⁴
142. From the standpoint of both Parties it may be concluded that, in the case at hand, the interpretation of a treaty clause was requested, which only requires the existence of opposing viewpoints or interests between the parties. This dispute regards the interpretation of a treaty provision that, in accordance with the wording of article VII, does not require one of the parties to be charged with the violation of one Treaty provision by the other party. It is clear that the United States has adopted specific behavior that permits, in the particular circumstances of this case, the inference of its stance regarding the interpretation of Article II(7) of the Treaty.
143. The cited jurisprudence confirmed that failure by one of the parties to provide a response to the other party's demand may be construed as positive opposition for the purposes of giving rise to a dispute between States. Silence by one of the parties, within the framework of particular circumstances in a specific case, accounts for the positive opposition to the explicit request of the

⁸⁶ *Ibid.*, para. 75.

⁸⁷ *Ibid.*, para. 92.

⁸⁸ *Ibid.*, para. 98.

⁸⁹ Conf. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Decision on 11 June 1998, *ICJ Reports 1998*.

⁹⁰ Claimant's Counter-Memorial on Jurisdiction, para. 99.

⁹¹ *Ibid.*, para. 101.

⁹² Respondent's Memorial on Objections to Jurisdiction, pp. 29-30.

⁹³ *Ibid.*, p. 32.

⁹⁴ *Ibid.*, pp. 32 *et seq.*

other party. The simple invocation by a State of its intention to refrain from responding to a request grounded on the inexistence of a dispute, is sufficient evidence of the very existence of said dispute.

144. The fact that Ecuador does not allege a breach of a Treaty provision does not limit its right to request the interpretation of a Treaty provision subject to the compromissory clause of Article VII, nor does it inhibit inferring from the other party's behavior the existence of a positive opposition to its request, which gives rise to a dispute on interpretation.
145. The requirement of positive opposition does not necessarily imply the expression of different interests, and evidencing simple opposition by one State to the request by the other State will suffice. In the *South West Africa* case, the ICJ held that:

[...] a mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of a dispute proves its non existence. **Nor is it adequate to show that the interests of the two Parties to such a case are in conflict.** It must be shown that the claim of one Party is positively opposed by the other.⁹⁵

146. Taking into consideration the above criteria, I believe that, under international law, there can exist a dispute between States which stems from the attitude of one of the parties regarding the claim brought by the party on the interpretation of a treaty clause.
147. In short, the requirement of a positive opposition does not necessarily imply an *expressis verbis* opposition.⁹⁶ To infer positive opposition from the attitude of a State requires that the claim brought by the other State must be express and clear. In addition, it is necessary that the State against which a claim is brought was given the opportunity to apprehend the content and the scope of the claim, and that positive opposition is grounded on an objective determination of the circumstances in the particular case.
148. In my opinion, in the event that the conditions above were met in this case, they would support the existence of a dispute inferred from the positive opposition of the United States by its actions and omissions *vis-à-vis* Ecuador's claims.

c) Inference of positive opposition in international law

149. General international law, as applied by the International Court of Justice, has recognized the possibility to infer from a State's attitude the existence of a dispute, even when that State has alleged that there is no such dispute. The most relevant cases discussed by both Parties are *Georgia v. Russia* and *Cameroon v. Nigeria*.
150. The possibility to infer the existence of a dispute from a State's attitude has also been recognized by Respondent's expert Professor Tomuschat.
151. On that point, Professor Tomuschat expressed that "[i]n the recent case of *Georgia v. Russian Federation* the ICJ emphasized that the existence of a dispute may be 'inferred from the failure of a State to respond to a claim in circumstances where a response is called for'". But even if for Professor Tomuschat, no legal obligation existed for the United States Government to take a stance

⁹⁵ *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa), Decision of 21 December 1962, *ICJ Reports* 1962, p. 328 (emphasis added).

⁹⁶ *Cameroon v. Nigeria*, *ICJ Reports* 1998, p. 315.

as to the request contained in the letter of 8 June 2010. He concedes that: “[i]t may well be that in exceptional circumstances one of the contracting parties may be compelled to respond to a question put to it, even where a specific legal obligation cannot be identified. However, just the will of one of the parties does not give rise to such an exceptional situation. In any event, the requested government would have had to contribute to the situation that requires clarification.”⁹⁷

152. The United States has also admitted that proposition when Counsel for the United States during the Hearing on Jurisdiction expressed that “[...] in most cases this opposition is evidenced by public statements of the Respondent. **In a few cases, however, the ICJ has found that the actions of the Respondent manifest its opposition so clearly that an oral or written statement of its opposition is not necessary**”.⁹⁸
153. It is appropriate now to refer to the ICJ cases discussed by the Parties in the present case in relation to the inference of a dispute from State’s actions or omissions.
154. In the *Georgia v. Russia* case, the Court

[...] observes at this stage that a dispute is more likely to be evidenced by a direct clash of positions stated by the two Parties about their respective rights and obligations in respect to the elimination of racial discrimination, in an exchange between them, **but, as the Court has already noted, there are circumstances in which the existence of a dispute may be inferred from the failure to respond to a claim** (see paragraph 30) Further, in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level [...].⁹⁹

Paragraph 30 provides that “[...] the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for [...]”.¹⁰⁰

155. For the Court, the failure of a State “to respond” does not depend on the existence of a prior legal obligation but rather is based on the circumstances where a response is called for. In that context, the Court has inferred the existence of a dispute from the simple acknowledgment by a State of the subject matter of a claim against it and from the mere rejection of such claim.
156. It is relevant to take note that the rejection by the Russian Federation of the Georgian claims was inferred by the Court from two official Russian statements: the first one, was made by the representative of the Russian Federation at the Security Council meeting on 10 August 2008, and the second was made by the Russian Minister of Foreign Affairs in a Joint press conference with the Minister of Foreign Affairs of Finland in his capacity as Chairman-in-Office of the OSCE on the 12 of August 2008.¹⁰¹
157. Those exchanges and the above-mentioned press conference did not contain any express statement by the Russian Federation which accepted or recognized the existence of a dispute. That is why the

⁹⁷ Respondent’s Memorial on Jurisdiction, Expert Opinion of Professor Tomuschat, pp. 8-9.

⁹⁸ Hearing on Jurisdiction, June 25, 2012, Transcripts p. 170: 18-22 (emphasis added).

⁹⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Decision of 1 April 2011, *ICJ Reports 2011*, para. 37 (emphasis added).

¹⁰⁰ *Ibid.*, para. 30.

¹⁰¹ *Ibid.*, paras. 109-112.

ICJ objectively determined the existence of the dispute by inference from the Russian Federation's rejection of the very existence of a dispute.¹⁰²

158. The case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) is another relevant ICJ precedent on the determination of the existence of a dispute by inference from the attitude of one of the parties.¹⁰³ In that case, Nigeria alleged as its fifth preliminary objection that there is no dispute concerning “*boundary delimitation as such*” throughout the whole length of the boundary from the tripoint in Lake Chad to the sea, and subject within Lake Chad, to the question of the title over Darak and adjacent islands, and without prejudice to the title over the Bakassi Peninsula.¹⁰⁴
159. The Court stated that “there can be no doubt about the existence of disputes with respect to Darak and adjacent islands, Tipsan, as well as the peninsula of Bakassi”.¹⁰⁵ However, given the great length of the boundary, the Court concluded that “it cannot be said that these disputes in themselves concern so large a portion of the boundary that they would necessarily constitute a dispute concerning the whole of the boundary”.¹⁰⁶ It added that

Further, the Court notes that, with regard to the whole of the boundary, there is no explicit challenge from Nigeria. **However, a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated expressis verbis. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the profess view of that party.** In this respect the Court does not find persuasive the argument of Cameroon that the challenges by Nigeria to the validity of the existing titles to Bakassi, Darak and Tipsan, necessarily calls into question the validity as such of the instruments on which the course of the entire boundary from the tripoint in Lake Chad to the sea is based, and therefore proves the existence of a dispute concerning the whole of the boundary.¹⁰⁷

160. The Court clearly stated that positive opposition to a claim from one party by the other need not be express. Therefore, in determining the existence of a dispute, the stance taken by a party may be established by inference, regardless of the viewpoints it expresses.
161. In reference to the border incidents the Court observed

Even taken together with the existing boundary disputes, the incidents and incursions reported by Cameroon do not establish by themselves the existence of a dispute concerning all of the boundary between Cameroon and Nigeria.¹⁰⁸

However the Court notes that Nigeria has constantly reserved in a manner in which it has presented its own position on the matter. **Although Nigeria knew about Cameroon's preoccupation and concerns, it has repeated, and has not gone beyond, the statement that there is no dispute concerning boundary delimitation**

¹⁰² *Ibid.*, para. 113.

¹⁰³ *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, ICJ Reports 1998.*

¹⁰⁴ *Ibid.*, p. 313.

¹⁰⁵ *Ibid.* para. 87.

¹⁰⁶ *Ibid.*, para. 88.

¹⁰⁷ *Ibid.*, para. 89 (emphasis added).

¹⁰⁸ *Ibid.*, para. 90.

as such. Nigeria has shown the same caution in replying to the question asked by a Member of the Court in the Oral Proceedings (see paragraph 85 above).¹⁰⁹

162. Regarding the answer provided by Nigeria to a question formulated by one of the judges, the Court stated

The Court notes that, in this reply, Nigeria does not indicate whether or not it agrees with Cameroon on the course of the boundary or its legal basis, though clearly it does differ with Cameroon about Darak, and adjacent islands, Tipsan and Bakassi.¹¹⁰

Nigeria maintains that there is no dispute concerning the delimitation of that boundary as such throughout its whole length from the tripoint in Lake Chad to the sea [...] and that Cameroon's request definitively to determine the boundary is not admissible in the absence of such a dispute. **However Nigeria has not indicated its agreement with Cameroon on the course of that boundary or on its legal basis ... and it has not informed the Court of the position which it will take in the future on Cameroon's claims.** Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings; in the circumstances however, the Court finds itself in a situation in which it cannot decline to examine the submission of Cameroon on the ground that there is no dispute between the two States. Because of Nigeria's position, the exact scope of the dispute cannot be determined at present; a dispute nevertheless exists between the two Parties, at least as regards the legal basis of the boundary. It is for the Court to pass upon this dispute.¹¹¹

163. The Court, in assessing Nigeria's denial of the existence of a dispute on the entire border with Cameroon, believed that it was placed in a situation where it could not decline its jurisdiction on the basis that there was no dispute between those two States. Lack of acknowledgement by one State of the existence of a dispute faced with the claims brought by another State, does not inhibit the tribunal from exercising its jurisdiction.
164. Likewise, the Court acknowledged that the Party which denies the existence of the dispute can express its arguments during the merits stage of the proceedings for the matters at issue. Thus, the Court confirmed that in order to determine if it had jurisdiction to decide on a case where a party denied the existence of a dispute, it could infer from the attitudes of the party in question that such dispute existed *prima facie* in order to analyze the merits of the claims brought by the other party.
165. Given the principles applied by the ICJ in the precedents cited above to determine the existence of a dispute by inference from the denial of a dispute by a State, it may be concluded that these cases are relevant for the assessment of the legal effects of the silence alleged by the United States and the legal consequences of its statement that there is no dispute.

d) Relevant Facts for the Determination of a Positive Opposition by Inference

¹⁰⁹ *Ibid.*, para. 91 (emphasis added).

¹¹⁰ *Ibid.*, para. 92.

¹¹¹ *Ibid.*, para. 93 (emphasis added).

166. It is clear that in the case at hand there is a factual scenario that predetermines the context in which the dispute on the interpretation of a Treaty clause could have arisen between the Parties. Thus, it is necessary to refer to the facts that allegedly generated a dispute on the interpretation of Article II(7) of the BIT.
167. First, it should be noted that the facts alleged by Ecuador were not challenged by the United States.¹¹² These relevant facts refer to certain diplomatic exchanges including official letters exchanged by the Parties and a meeting held between representatives of the Parties, followed by telephone conversations.
168. Regarding the exchange of official letters, we shall first refer to the letter sent by the Ecuadorian Minister of Foreign Affairs, Mr. Patiño Aroca, to the Secretary of State, Ms. H. Clinton, on 8 June 2010. In this letter, Ecuador stated:

On behalf of the Government of the Republic of Ecuador, I meet to submit to the Illustrious Government of the United States, through your Excellency, various delicate matters that have arisen around the proper interpretation and application to be given to the terms of the Treaty between the Republic of Ecuador and the United States of America concerning the Encouragement and Reciprocal Protection of Investments which was signed on August 27, 1993 and which entered into force on May 11, 1997 [...]. These issues put into question the common intent of the Parties with respect to the nature of their mutual obligations regarding investments of nationals or companies of the other Party. They also threaten to undermine the proper administration of the procedures for resolving disputes between investors of one State and the other State.¹¹³

169. After describing its concern for the Arbitral Award rendered in *Chevron v. Ecuador*, “[...] the Government of the Republic of Ecuador respectfully request[ed] that the Illustrious Government of the United States of America confirm, by a note of reply, the agreed [...]” interpretation that the Government of Ecuador has outlined above. According to Ecuador, the dispute is preceded by the incorrect interpretation and application of Article II(7) of the Treaty¹¹⁴ in the partial Award rendered in *Chevron*.¹¹⁵
170. At the end of the letter, Ecuador concludes that:

If such a confirming note is not forthcoming or otherwise the Illustrious Government of the United States does not agree with the interpretation of Art. II.7 of the Treaty by the Government of the Republic of Ecuador, an unresolved dispute must be considered to exist between the Government of the Republic of Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty.¹¹⁶

¹¹² Transcript (Hearing on Jurisdiction), 25 June 2012, p. 97:1-11.

¹¹³ Letter 13528 GM/2010 addressed by the Minister of Foreign Affairs of Ecuador to the Secretary of State of the United States of America on 8 June 2010, non-official translation provided by the Republic of Ecuador.

¹¹⁴ Letter 13528 GM/2010 addressed by the Minister of Foreign Affairs of Ecuador to the Secretary of State of the United States of America on 8 June 2010, pp. 4 et seq.

¹¹⁵ *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA case No. 2007-2, Partial Award, 30 March 2010.

¹¹⁶ Letter 13528 GM/2010 addressed by the Minister of Foreign Affairs of Ecuador to the Secretary of State of the United States of America on 8 June 2010, p.4, non-official translated provided by the Republic of Ecuador.

171. Ecuador's letter led to a meeting held in the Department of State on 17 June 2010, between the Ecuadorian Ambassador to the United States, Mr. Gallegos, and the Legal Advisor of the Department of State, Mr. Koh.¹¹⁷ The meeting evidenced a mutual intention to remain in contact in relation to the matters outlined in the letter dated 8 June 2010.¹¹⁸
172. The formal reply of the United States to Ecuador's letter mentioned above was signed by the Assistant Secretary of the Bureau of Western Hemisphere Affairs on 23 August 2010.
173. The letter of the Assistant Secretary read as follows:
- Thank you for your letter of June 8 addressed to Secretary Clinton regarding the interpretation of Article II (7) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment. Secretary Clinton asks me to reply on her behalf.
- The Department of State wishes to convey to the Government of Ecuador that the U.S. Government is currently reviewing the views expressed in your letter and considering the concerns that they have raised. We look forward to remaining in contact about this and other important issues that affect our nations.¹¹⁹
174. This letter acknowledges the content and scope of the request put forth by Ecuador in its letter dated 8 June 2010. By means of such letter, the United States informed that it was duly considering the concerns raised by Ecuador.
175. The letter of the Assistant Secretary does not express any kind of unease or animosity in relation to Ecuador's proposal. Furthermore, the letter expressed the interest of the Department of State in keeping in touch regarding the matters outlined and some other important matters of common interest to both States.
176. From that date onwards, Ecuador alleged that it attempted to contact the Legal Advisor, Mr. Koh, through several telephone calls. Eventually, Mr. Koh and Mr. Gallegos had a telephone conversation on 8 October 2010. According to Ecuador, during that conversation, Mr. Koh stated that the United States would not reply to the request made by Ecuador in its letter dated 8 June¹²⁰ since, according to the United States, it was difficult to consider a request for the interpretation of a treaty while Ecuador was in the process of terminating that agreement.¹²¹
177. Ecuador held that the dispute arose from the United States' refusal to discuss Ecuador's request which should have been answered. Ecuador contended that its efforts to reach a solution by consultations or by other diplomatic channels proved unsuccessful and, thus, the matter remained unresolved. Ecuador stated that "[the] Request for Arbitration seeks resolution of the dispute, in the interest of both Parties, by means of an authoritative determination on the proper interpretation and application of paragraph 7 of Article 11 of the 'Treaty that accords with what the Republic of Ecuador considers to have been the intentions of the Parties at the time when the Treaty was concluded'.¹²²

¹¹⁷ Claimant's Counter-Memorial on Jurisdiction, para. 15.

¹¹⁸ Witness Statement of Mr. Ambassador Luis Benigno Gallegos of 23 May 2012, Annex to the Counter-Memorial.

¹¹⁹ Letter by the Assistant Secretary of the Bureau of Western Hemisphere Affairs, dated 23 August 2010.

¹²⁰ Witness Statement of Mr. Ambassador Luis Benigno Gallegos of 23 May 2012, Annex to the Counter-Memorial.

¹²¹ Respondent's Statement of Defense, p. 7.

¹²² Claimant's Request, p. 7.

178. During the Hearing on Jurisdiction, the Respondent’s counsel affirmed that the United States had decided not to reply to the request submitted by Ecuador. Accordingly, they stated: “To be clear, the United States did respond to Ecuador by stating that it would remain silent on Ecuador’s interpretation”.¹²³
179. Thus, confirmation was given of Ecuador’s allegations regarding the content of the telephone conversation between Ecuador’s Ambassador and the Legal Advisor of the United States Department of State.
180. According to the United States, Ecuador has invented a dispute by means of an ultimatum based on the formula “to agree or to dispute”. From a strictly objective standpoint, in order to justify the above statement, the United States must demonstrate Ecuador’s bad faith when faced with the United States’ own actions, having failed to respond to Ecuador and having denied the existence of the dispute.
181. The United States attempted to justify its alleged silence by reference to certain facts and actions by Ecuador. The United States stressed the fact that Ecuador threatened to denounce the Treaty whose interpretation was being pursued, apart from having denounced the Washington Convention (ICSID Convention). In addition, the United States affirmed that the Constitutional Court of Ecuador found that the provisions of the BITs between investors and a State Party is unconstitutional, which Ecuador now relies on as the sole grounds for this Tribunal’s jurisdiction, are unconstitutional.¹²⁴ Similarly, the United States noted that on 7 July 2011, Ecuador submitted a claim before The Hague’s District Court seeking to annul the awards rendered in *Chevron*, although it had already presented its Request for Arbitration on 28 June 2011.
182. Ecuador stated that the United States’ failure to respond cannot be based on or justified by its denunciation of other BITs or other internal measures, since such measures cannot modify the international obligations of Ecuador.¹²⁵
183. According to Ecuador, it is important to consider that the Treaty whose interpretation is pursued was and is in force, and that pursuant to Article XII, even if denounced, it continues to protect investors who made investments before the date of denunciation for ten more years.¹²⁶
184. Concerning these facts, I consider that the letter sent by Ecuador of 8 June 2010, was not initially regarded by the United States as an ultimatum, but rather as an invitation to make future diplomatic exchanges. In any event, Ecuador’s decision to commence an arbitration proceeding cannot be considered inamicable. Ecuador alleged that the Request for Arbitration was based on the impossibility to continue negotiating, in view of the response it received to its questions.
185. In this regard, it is difficult to understand to what extent the decision to trigger a dispute settlement mechanism that had been previously agreed by the Parties can compromise the good faith of the State resorting to this mechanism faced with the alleged absence of an openness to negotiate by the other party.
186. Accordingly, it should be recalled that Article VII of the BIT does not require reference to diplomatic channels or consultations before having recourse to arbitration. Furthermore, the

¹²³ Transcript (Hearing on Jurisdiction), June 25 2012, p. 186:4-6.

¹²⁴ Respondent’s Memorial on Objections to Jurisdiction, pp. 13-14.

¹²⁵ Claimant’s Counter-Memorial, para. 100.

¹²⁶ *Ibid.*

negotiations provided for in Article V are not a condition precedent to trigger the arbitration mechanism established in Article VII of the BIT. Therefore, in this case the uncontested facts suggest that the somewhat precarious diplomatic endeavors by Ecuador were thwarted by the notice that the United States had decided not to respond, followed by Ecuador's lack of insistence to resume conversations.

187. In any case, the commencement of arbitration proceedings is independent from negotiations or the continuation of previously undertaken negotiations or diplomatic overtures. Therefore, to verify the required positive opposition of the United States to the request submitted by Ecuador, the critical date of the dispute would be the time in which the United States decided to inform Ecuador of its intention not to respond and in which, based on such failure to respond, its silence confirmed the existence of a dispute on the interpretation of Article II(7) of the BIT.
188. In sum, the sequence of relevant facts in the relations maintained between both Parties evidences a closed door towards future diplomatic relations concerning the request submitted by Ecuador in the letter of 8 June 2010, and the discussions held by the representatives of the Parties of 17 June 2010.
189. Ecuador finally presented its Request for Arbitration on 28 June 2011, relying upon Article VII of the BIT.
190. The relevance or irrelevance of negotiations undertaken before the commencement of an arbitration in case at hand can be determined by following the principles applied in international case law.
191. Thus, it is helpful to note that in *Mavrommatis*, even considering that Article 26 of the Palestine Mandate¹²⁷ established that only those cases in which the dispute could not be settled by negotiations could have recourse to the Permanent Court—unlike the BIT between Ecuador and the United States—, the PCIJ affirmed:

Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or it finally a point is reached at which one of the parties definitely declares himself unable, or refuses, to give way, and then can therefore be no doubt that the dispute can not be settled by diplomatic negotiations.¹²⁸

192. The Court then expressed:

[...] on January 26th 1924, the Greek Legation in London wrote to the Foreign Office in order to ascertain whether in the opinion of the British Government, “M. Mavrommatis claims could not satisfactory met” or submitted to arbitration...; and the note of His British Majesty’s Secretary of State for Foreign Affairs, dated April 1st, 1924 **was regarded by Greece as a definitely negative reply**.¹²⁹

193. On this point, the Court concluded that:

¹²⁷ Article 26 provides: “The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or application of the provisions of the Mandate, such dispute, if it can not be settle by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations”.

¹²⁸ The Mavrommatis Palestine Concessions, PCIJ, Series A, No 2, p. 13.

¹²⁹ *Ibid.*, p. 14 (emphasis added).

The matter had reached this stage when the Greek Government, **considering that there was no hope of effecting a settlement by further negotiation** [...] sent to the Foreign Office a dispatch dated May 12, 1924, informing its Britannic Majesty's government of its decision to refer the dispute to the Court [...] a decision which [...] it proceeded to carry out on the following day [...].¹³⁰

194. Although *Mavrommatis* is a case concerning diplomatic protection and the alleged breach of the Palestine Mandate, it is a valid precedent for the purposes of defining the role of diplomatic exchanges in relation to the inference of a dispute from the positive opposition of a State. It is also a relevant precedent that evidences that the claiming State must determine whether there are any possibilities left to continue negotiating or whether the attitude of the other State implies a refusal that thwarts any attempt to negotiate.
195. In the understanding that the wording of Article VII does not require previous negotiations, the relevance of diplomatic exchanges between Ecuador and the United States provides a clear benchmark to assess the context in which it is possible to objectively infer the positive opposition of one of the Parties towards the claim of the other.

e) The Respondent's positive opposition to Ecuador's interpretation of Article II(7) - Silence in International Law

196. The main disagreement between the Parties relates to whether the Respondent's silence and its refusal to respond leads, in the particular circumstances of the case, to the inference that United States is opposed to Ecuador's interpretation of article II(7) of the BIT.
197. State silence as such cannot be thought to have any meaning unless connected with a legal or factual situation particularly the act or claim of another State. The ICJ has determined that silence may also speak, but only if the conduct of the other State calls for a response.¹³¹
198. In that context is relevant to note that the International Law Commission Special *Rapporteur* on Unilateral Acts of States has expressed that silence, as a State behaviour having legal effects, is reactive. It acquires juridical value when a State is faced with a situation, normally an act performed or a claim raised by another State, which calls for its reaction.¹³²
199. International tribunals have managed to take into account objective criteria in order to evaluate a State's silence as an issue separate from the actual intent of the silent State. Political motivations behind a State's silence have been rejected by the ICJ as relevant.¹³³ Reference to objective criteria guarantees legal certainty and credibility.
200. In several occasions the ICJ has determined the legal effects of a State's silence, interpreting the context in which a reaction was expected or "called for".¹³⁴

¹³⁰ *Ibid.*, p. 15 (emphasis added).

¹³¹ Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008, ICJ Reports 2008, para. 121.

¹³² Conf. S. Kopela, "The legal value of silence in the jurisprudence of the International Court", p. 91 (quoting (2001) *I Yearbook of the ILC*, 197 [27] [meeting of the 26 July 2001]).

¹³³ *Minquiers and Ecrehos* (France/United Kingdom), Judgment of 17 November 1953, *ICJ Reports* 1953.

¹³⁴ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Judgment of 1 April 2011, ICJ Reports, 2011.

201. The circumstances under which silence has to be interpreted is a matter of substance not of form.¹³⁵ The intention behind the State's refusal to respond is irrelevant under international law.¹³⁶
202. It is relevant therefore to take note of the United States position as expressed by Counsel during the Hearing on Jurisdiction: "To be clear, the United States did respond to Ecuador by stating that it would remain silent on Ecuador's interpretation".¹³⁷
203. This means that there is a response by the United States: to maintain silence. But the legal effects of silence do not depend from the intention or will of the silent State. The effects of silence depend upon the objective determination of the circumstances in which silence has been manifested.¹³⁸
204. The United States has not referred to a single precedent to support its position in relation to the legal effects of silence. It could not even demonstrate its own pretended effects derived from silence. International precedents have confirmed that the State's intention regarding its silence is not relevant to determine the legal effects of its behaviour. Moreover, in the present case there is a clear intent by the Respondent "not to respond".
205. In the present case, positive opposition can be inferred from the United States' attitude. International law, as applied by the ICJ, has established the possibility of inferring the existence of a dispute from different attitudes assumed by States; even from the circumstances in which a State's denial of the existence of a dispute would imply the very existence of such dispute.
206. The United States argued that the only way to evidence positive opposition is by opposing the other State's claim through a State's words or actions.¹³⁹ This argument by the United States is in contradiction with the ICJ's reiterated recognition of the ability to infer positive opposition that arises from a State's own actions or omissions. As stated by the ICJ, positive opposition is not reduced to express opposition.¹⁴⁰
207. Silence is a clear manifestation of the will and intention of the United States not to reveal its own interpretation. Silence cannot benefit the State that wantonly decides not to respond to a treaty partner's request or claim. The United States has not denied that it has its own interpretation and it has also confirmed during the First Hearing that a treaty interpretation by the United States Government could vary from one administration to another.¹⁴¹
208. The United States allegation that the case concerns a "dispute" created by one party giving an ultimatum to the other, to "either agree with our interpretation or there is a dispute", is unfounded on the facts. The United States' note dated August 23, 2010, in answering the so-called Ecuador's ultimatum, recognised the initiation of an informal consultation process. That process was later on deadlocked by United States' attitude of not responding and further by assuming that there was no dispute.

¹³⁵ *Ibid.*, para. 30, p. 16.

¹³⁶ Conf. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening), Judgment of 11 June 1998, ICJ Reports 1998.

¹³⁷ Transcript (Hearing on Jurisdiction), June 25, 2012, p. 186: 4-6.

¹³⁸ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950, ICJ Reports 1950.

¹³⁹ Transcript (Hearing on Jurisdiction), June 25, 2012, p. 162:9-15.

¹⁴⁰ *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports 1998, para. 89.

¹⁴¹ Transcript (Preparatory Meeting), 21 March 2010, Mr. Koh, pp. 100:23-101:6.

209. The United States' notification to Ecuador of its intention not to respond, constituted within the factual circumstances of the informal diplomatic intercourse between the Parties a relevant unilateral act from which positive opposition *vis a vis* the requesting State can be directly inferred.
210. Under these circumstances the calling for a response was directly related to the need to promote assurances of fair juridical certainty attached to the interpretation of treaties, as well as transparency and good faith in their interpretation and application.
211. There are no multiple possibilities as to the interpretation of the United States' determination not to respond. At the Hearing on Jurisdiction, the United States counsel confirmed that there are only two possibilities: to agree or to disagree.
212. Counsel for the United States has maintained, “[s]ilence can express either agreement or disagreement with the proposed interpretation. States may consider it unnecessary to respond to an interpretative declaration because they share the views expressed therein, or they may feel that the interpretation is erroneous, but there is no point in saying so since, in any event, the interpretation would not, in their view be upheld by an impartial third party in case of a dispute. It is impossible to determine which of these two hypotheses is correct”.¹⁴²
213. The United States assumed, from its decision not to respond, that there was no dispute. The United States' decision not to respond produced legal effects independently from its own will or intention. If there is no dispute there is an agreement, there is not a third possibility. There are no legal precedents on limbo situations generated by the wanton silence of a party to a treaty when confronted with a claim made by other party.
214. In my understanding, the United States has confirmed that there are only two substantive ways in which Ecuador's request could be answered: to agree or to disagree. The discretionary power of a State to maintain silence does not alter the number of options from which it will be possible to infer an agreement or a disagreement. Under those circumstances, the State's intention to maintain silence is an expression of its interest, for whatever reason, not to reveal its position.
215. From the United States' attitude denying the existence of a dispute it is illogical to imply its agreement with Ecuador. Thus, the only alternative left under the present factual circumstances is to infer the United States' positive opposition to Ecuador request.
216. The inference of positive opposition on the part of the United States from its attitude towards the present case was equally confirmed by the positions taken by the United States during the present arbitration proceedings, repeatedly and impliedly expressing doubts regarding Ecuador's claim.

e) Conclusion and Consequences on the Existence of a Dispute

217. By virtue of the foregoing and considering that, according to the judicial precedents cited by the Parties, this is a substantive rather than a procedural issue, I hereby conclude that there is a dispute between Ecuador and the United States on the interpretation of Article II(7) of the BIT, since the United States' positive opposition to Ecuador's claim was determined by inference from the objective determination of the facts and circumstances relevant to the case at issue.

¹⁴² Transcript (Hearing on Jurisdiction), June 25, 2012, p. 193:1-9 (emphasis added).

218. As already stated in several passages of this Dissent, under article VII consultations or negotiations are not a pre-requisite for recourse to arbitration. Thus a State party is entitled to activate the compromissory clause of article VII by which both States agreed on a binding State to State arbitration system for the settlement of their disputes concerning the interpretation or the application of the treaty. Thus, in a State-to-State arbitration under article VII the parties to the treaty have already committed themselves to settle their disputes (any dispute) concerning the interpretation or application of the treaty.
219. The United States' affirmation that "[...] the practice of States in their Treaty relations recognizes that the way the Parties to a treaty control or clarify its meaning is through negotiation and agreement ... The avenues for the management and interpretation of treaties are to be pursued at the discretion and mutual interest of States that are Parties to the treaties"¹⁴³ may be considered as a valid presumption pending on the agreement of the Parties. But such a presumption could not derogate from a previously agreed compromissory clause for the settlement of any dispute concerning the interpretation of a treaty, such as article VII of the BIT.
220. The above conclusion is in accordance with the message of the President of the United States to the United States Congress in connection with the ratification of the Ecuador-United States BIT expressing that: "Article VII provides for binding arbitration of disputes between the United States and Ecuador that are not resolved through consultations or other diplomatic channels. **The article constitutes each Party's prior consent to arbitration**".¹⁴⁴
221. The United States' allegation that under article VII of the BIT one party cannot be forced to do something that it had not agreed in the BIT to do¹⁴⁵ contradicts the express wording of that treaty clause. Article VII speaks for itself.
222. I understand that the legal precedents discussed by the Parties support, *prima facie* and in the factual circumstances of the case, the existence of a dispute over which this Tribunal can exercise its jurisdiction in accordance with Article VII of the BIT.

IV. Conclusions on the Opinion of the Majority

223. By virtue of all the foregoing reasons, I dissent from the arguments of the majority, and therefore, from the conclusion arrived at thereby.
224. First, I consider that the magnitude of the case and the efforts made by the Parties in the preparation and presentation of their relevant positions deserve a proper legal analysis of all the subjects put forward, to the exclusion of mere speculation, as utilized by the majority on the alleged intention of the Parties.
225. Accordingly, I disagree with the fact that the majority analyses in depth, neither the content of the compromissory clause of Article VII of the BIT, nor the positions of the Parties as to the scope thereof. The majority does nothing but assume that there must be a concrete case for a dispute to exist between States insofar as the claim on the merits has implications or consequences between the Parties.

¹⁴³ *Ibid.*, p. 196:1-11.

¹⁴⁴ In accordance with the Memorandum addressed by the President of the United States of America to the United States Congress in relation to the BIT between Ecuador and the United States. (emphasis added).

¹⁴⁵ Respondent's Memorial on Objections to Jurisdiction, pp. 62 et seq.

226. I disagree with the reasoning of the majority on these issues, as it limits itself to an erroneous interpretation of the finding of the ICJ contained in a single paragraph of the judgment issued in the case concerning *Northern Cameroons* and in the Separate Opinion of Judge Fitzmaurice.
227. In this Award, the majority overlooks the fact that, in *Northern Cameroons*, the Court admitted that a dispute existed and that, given that the treaty relied upon was no longer in force and effect, the Court held that issuing a judgment would have no legal consequences or effects. In *Northern Cameroons*, according to the Court, the existence of practical consequences of a judgment was not related to the existence of a dispute, but to the force and effect of the legal rule which was the subject-matter of the dispute. It is worth recalling that, in its Separate Opinion, Judge Fitzmaurice expressed his dissent from the majority of the Court as to the existence of a dispute between Cameroon and the United Kingdom as well as the power to issue a declaratory judgment asserted by the Court.
228. I disagree with the statement whereby a concrete case as defined by the majority is required under international law for a dispute on treaty interpretation to exist. The precedents from international courts and tribunals analysed above fail to support the position adopted by the majority.
229. With regard to the practical consequences of the Award, the majority errs when holding that the principal issue of interpretation before the Tribunal focuses on Ecuador's obligations *vis-à-vis* such investors as Chevron, not on obligations concerning the United States.¹⁴⁶ On the basis of this assumption, the majority erroneously finds that a decision by the Tribunal would only have consequences for Ecuador, not the United States, as the majority presumes—on no further grounds—that the United States would not claim an interpretation different from that determined by a tribunal under Article VI of the Treaty.
230. With reference to the cases cited by Ecuador in order to show that a breach of a rule of international law need not be established for a tribunal to exercise jurisdiction, the majority believes that there were practical consequences for both Parties in the settlement of an interpretive dispute in all cases. According to the majority, such practical consequences do not arise in the instant case.¹⁴⁷ The majority speculates that such consequences could only arise for one of the Parties within the framework of a direct claim of breach or a claim for diplomatic protection by the United States in favour of one of its investors against Ecuador.¹⁴⁸ The majority adds to the confusion by stating that “[t]he Tribunal makes no finding on this point, but is not persuaded to exclude this possibility outright”,¹⁴⁹ to go on to assert that it is impossible to exclude the possibility that the United States, when approached by an aggrieved investor, might agree with the interpretation that Ecuador has put forward.¹⁵⁰
231. I disagree with this conclusion of the majority, since, in my view, the legal consequences of an award do not depend on the future acts or omissions of one of the Parties, let alone on the speculative inferences that the Tribunal may make on such prospective future attitudes of one of the Parties.
232. Further, I disagree with the conclusion of the majority on the existence of practical consequences in the case at hand hailing from the fact that the majority's assertion that it cannot conclude that a proper case for adjudication has been presented by the Claimant was grounded on its own conclusion on the inexistence of a dispute on the interpretation of Article II(7), to which it expressly

¹⁴⁶ Award, para. 198.

¹⁴⁷ Award, para. 204.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Award, para. 205.

admits that it would only make reference thereafter.¹⁵¹ Not only do I disagree with the conclusion, which, I opine, features speculative grounds unsupported in law on the position that one of the Parties would purportedly assume, but I also disagree with the elliptical and misleading manner in which the majority presents its reasoning on grounds which have not yet been addressed thereby.

233. In regard to the issue concerning the existence of a dispute, the majority, upon citing the ICJ in the case of *Georgia v. Russia* regarding the definition of dispute, decides to disregard the content of such definition to then put forward reasons as to the practical consequences of a judgment, thereby mistaking the precise scope attached thereto by the Court in *Nothern Cameroons*.
234. The majority acknowledges that the specific issue facing the Tribunal is thus whether “the facts of this case” allow for the inference that the Respondent disagrees with the position of the Claimant regarding the interpretation of Article II(7).¹⁵² Nonetheless, rather than analyzing the facts and circumstances surrounding the case, the majority decides on the basis of arguments-rather than on the basis of “the facts of this case”- that it cannot infer “from any of these arguments” that the Respondent disagrees with the position of the Claimant.
235. The reasoning of the majority is grounded on the fact that it cannot exclude other reasonable explanations regarding the behavior of the Respondent that are not dependent upon its disagreement with Ecuador’s interpretation of Article II(7). The majority goes on and holds that the behavior of the Respondent is consistent with its desire not to interfere with decisions issued by Tribunals constituted under Article VI. Given the existence of such a plausible explanation for the United States’ silence, the majority concludes that the circumstances of the case warrant no inference of positive opposition.
236. I disagree with the above conclusion and I dissent from its rationale as it merely focuses on a simplistic subjective speculation that lacks any legal support
237. The majority disregards its obligation under international law to determine whether a dispute exists through an objective determination, and not from a merely subjective determination that depends on the purported intention of one of the Parties, which the majority affords itself the luxury of presuming. It should be recalled that, on several occasions, the ICJ recognized the obligation to make an objective determination: “*Whether there is a dispute in a given case is a matter for objective determination by the Court...The Court’s determination must turn on a determination of the facts*”.¹⁵³
238. I also disagree, on the basis that it is not impossible to understand the critical path of reasoning taken by the majority, who then admit in paragraph 215 of the Award that the issue facing the Tribunal is “whether the facts of this case allow for the inference” only to then reach the conclusion in paragraph 219 that it cannot infer opposition since it “cannot exclude other reasonable explanations for the Respondent’s behaviour”, which must, after all, refer to its intention, and therefore, to its full discretion.
239. I disagree with the conclusion of the majority that regards as a relevant factual matter that the Respondent has given a reasonable alternative explanation for its decision not to respond as a factual matter¹⁵⁴, thereby precluding any chance of inferring its opposition from an objective determination as required under the applicable law.

¹⁵¹ Award, para.207.

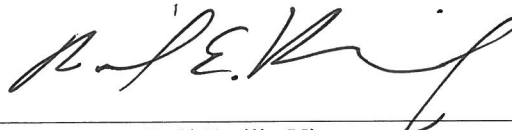
¹⁵² Award, para. 215.

¹⁵³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment of 1 April 2011, *ICJ Reports, 2011*, para. 30; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, *ICJ Reports 1950*.

¹⁵⁴ Award, para. 224.

240. My dissent on this point is grounded on the fact that, should an alternative explanation exist, a situation which the majority fails to prove this conclusion would contradict other arguments put forward by the Respondent regarding its decision not to respond, e.g. the admission on the part of the United States of having failed to take a stance; or holding that the Treaty's interpretation could change from one government administration of the United States to the next.¹⁵⁵
241. I disagree with the majority in that the Award ignores the significance attached by international law to unilateral acts of States and in that it minimizes the legal consequences that international law attaches to the silence of a State faced with a situation where claims are being made by another State.
242. I disagree with the statement of the majority that the jurisprudence cited by the Parties endorses its conclusion that an inference of "positive opposition" is warranted only when all other reasonable interpretations of the respondent's conduct and surrounding facts can be excluded.¹⁵⁶ My dissent is grounded on the fact that the above statement departs from the text and context of the very precedents cited. It is worth noting that such a strong statement finds support in no part of any authority.
243. Lastly, I disagree with the exclusively speculative statements of the majority concerning the existence of a possible dispute over the duty to respond or engage in consultations,¹⁵⁷ given that the Parties neither understood that such a dispute existed, nor put forward arguments on its purported existence.
244. In case of doubt, the Spanish original version prevails.

The Hague, 29 September 2012.



Raúl Emilio Vinuesa
Arbitrator

¹⁵⁵ Transcript (Preparatory Hearing), 21 March 2012, "[...] as you know, some times those determinations [on treaty interpretation] can change from one administration to next, and that makes even more important that we not prematurely make such decisions because we are in the middle of an election season and other issues are at stake [...]": Mr. Koh, p. 101:1-6.

¹⁵⁶ Award, para. 223.

¹⁵⁷ Award, paras. 225 et seq.